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as Trustee of SORENSEN RESEARCH AND
DEVELOPMENT TRUST

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JENS ERIK SORENSEN, as Trustee of
SOSENSEN RESEARCH AND
DEVELOPMENT TRUST,

Plaintiff

v.

LOGITECH INC., a California
Corporation; and DOES 1 – 100,

Defendants.

and related counterclaims.

) Case No. 08cv308 BTM CAB
)
) **PLAINTIFF’S MEMORANDUM OF**
) **POINTS & AUTHORITIES IN**
) **SUPPORT OF MOTION FOR**
) **EXCEPTION TO STAY TO**
) **PRESERVE EVIDENCE**

)
) Date: August 8, 2008
) Time: 11:00 a.m.
) Courtroom 15 – 5th Floor
) The Hon. Barry T. Moskowitz

) *Oral Argument Has Been Respectfully*
) *Requested by Plaintiff*
)
)

1 Plaintiff, pursuant to a shortened procedure outlined by Judge Moskowitz in
 2 related cases,¹ hereby requests the Court for an exception to the stay entered in this
 3 case in order to preserve evidence that will otherwise be unavailable after the stay.
 4 Plaintiff has presented its arguments in brief form pursuant to the Court's request.

5 Plaintiff has already requested this exception and discovery by letters to
 6 Defendants' counsel, but Defendants have failed to agree to the requested discovery
 7 and has also acknowledged their inability to preserve certain evidence. *Kramer*
 8 *Decl.*, ¶ 4, Exhibit A.

9 The requested discovery is as follows:

- 10 1. Confirmation of preservation of all prototype and production
 11 molds used in the production of the Accused Products if they are
 12 within possession, custody, or control of named Defendants; and
- 13 2. Confirmation of preservation of all design and technical
 14 documents for the Accused Products that are in the possession,
 15 custody, or control of named Defendants.

16 For any of the above categories of evidence that are in the possession, custody,
 17 or control of non-parties (as Plaintiff understands some to be), Plaintiff requests as
 18 follows:

- 19 3. Sworn identification of the company name(s) and address(s) of all
 20 non-party manufacturers, suppliers, and importers for the
 21 Accused Products; and
- 22 4. Court leave to use appropriate procedural steps to acquire the
 23 above-listed categories of evidence from, and/or conduct plant
 24 inspections of, non-parties.

25 Plaintiff believes these items of discovery are necessary and that delay until
 26

27 ¹ Sorensen v. Helen of Troy Texas Corporation, et al, Case No. 07cv02278
 28 (see relevant portion of the transcript at Appendix A hereto); and Sorensen v. Black
 & Decker Corporation, Case No. 06cv1572 (see Docket # 264-277, various entries).

1 completion of the '184 patent reexamination creates the risk of loss of evidence.

2 A motion to preserve evidence requires the court to consider "1) the level of
3 concern the court has for the continuing existence and maintenance of the integrity of
4 the evidence in question in the absence of an order directing preservation of the
5 evidence; 2) any irreparable harm likely to result to the party seeking the
6 preservation of evidence absent an order directing preservation; and 3) the capability
7 of an individual, entity, or party to maintain the evidence sought to be preserved, not
8 only as to the evidence's original form, condition or contents, but also the physical,
9 spatial and financial burdens created by ordering the evidence preservation." *Jacobs*
10 *v. Scribner Slip Copy*, 2007 WL 1994235 (E.D.Cal., 2007) citing: *Daniel v. Coleman*
11 *Co., Inc.*, No. 06-5706 KLS, 2007 WL 1463102, *2 (W.D.Wash., 2007).

12 Logitech is unwilling to identify the non-party entities who hold evidence vital
13 to this patent infringement case and have also stated that although they agree to
14 preserve relevant evidence within its custody and control, "Logitech cannot do
15 anything with respect to unspecified 'non parties' which may or may not be outside
16 the United States." *Kramer Decl.*, Exhibit A (letter dated June 25th).

17 Unidentified, and thus non-party, manufacturers, suppliers, and importers, of
18 the Accused Products may not have notice of this lawsuit and Plaintiff has no means
19 of ensuring that they are preserving evidence for this case. Neither the Court nor
20 Plaintiff can informally request evidence preservation, much less compel it, without
21 this identification.

22 WHEREFORE, Plaintiff respectfully requests the Court to order an exception
23 to the stay in this case for purpose of conducting the discovery outlined above.

24
25 //

26 //

27

28

1 DATED this Thursday, June 26, 2008.

2
3 JENS ERIK SORENSEN, as Trustee of
4 SORENSEN RESEARCH AND DEVELOPMENT
TRUST, Plaintiff

5
6 /s/ Melody A. Kramer

7 Melody A. Kramer, Esq.

8 J. Michael Kaler, Esq.

9 Attorneys for Plaintiff
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1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

3 JENS ERIK SORENSEN, as
4 Trustee of SORENSEN
5 RESEARCH AND DEVELOPMENT
6 TRUST,

7 Plaintiff,

8 vs.

9 HELEN OF TROY TEXAS
10 CORPORATION; OXO
11 INTERNATIONAL, LTD; and
12 DOES 1-100,

13 Defendants.

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) Case No. 07cv02278BTM
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)
) San Diego, California
)
) February 25, 2008

14
15
16 Status Conference

17 BEFORE THE HONORABLE BARRY TED MOSKOWITZ
18 UNITED STATES DISTRICT JUDGE

19 APPEARANCES:

20 *For the Plaintiff:*

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5 *Official Reporter:*

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1 thing is if I grant them an extension of time to answer of 60
2 days, and I grant the stay without prejudice and they answer
3 on behalf of Helen of Troy of Texas, and Oxo International,
4 then I think everything is taken care of.

5 MR. VON ZEIPPEL: That sounds good.

16:22:19

6 THE COURT: Mr. Kaler is about to speak.

7 MR. KALER: That would certainly be a resolution,
8 not one I'm thrilled with. Has the court considered the
9 possibility of a partial stay allowing some discovery, that
10 does not address claim construction issues, to preserve
11 evidence in these cases that are newly filed?

16:22:19

12 THE COURT: I have not considered it, but that is
13 certainly something that would be considered. No one should
14 be prejudiced by the stay. It would be unfair to the
15 plaintiff if there is a stay and something happens that they
16 lose evidence. So that's always an implied exception.

16:22:19

17 The stay is always granted without prejudice. If
18 that wasn't understood then perhaps it's my fault in not
19 making it clear.

20 MR. KALER: Would we need to bring a separate
21 motion?

16:22:20

22 THE COURT: First you would discuss it with the
23 party you would want to take discovery on, and if they didn't
24 agree, then you would then come before me.

25 MR. KALER: Okay.

16:22:20

1 THE COURT: And I think I would try to do it in a
2 way that the parties would file something very, very brief so
3 they don't take up a lot of attorney time and work, and then
4 I would hear it orally and I would rule on it right there.

5 In other words, you would file something, maybe a 16:22:20
6 page or two, saying we want to get an exception to the stay
7 for the following reasons, we are going to come into court on
8 such and such a date the clerk gives you, and we will flush
9 them out, but here it is in capsule form.

10 MR. KALER: Thank you, your Honor. 16:22:21

11 THE COURT: All right? So that's when I say the
12 stays are granted without prejudice. Well, does anyone have
13 a problem if we proceed this way? I know it's not ultimately
14 what you want, but you can't -- isn't there a song, You Can't
15 Always Get What You Want? 16:22:21

16 MR. KALER: Your Honor, I was actually hoping for
17 summary judgment in our favor this morning, but I'll take it.

18 THE COURT: Well, we will do an order in that
19 regard. Is 60 days enough to file an answer?

20 MR. VON ZEIPEL: I believe so. 16:22:21

21 THE COURT: And the order will provide that you can
22 file an amended answer 30 days after any re-examination
23 decision.

24 MR. VON ZEIPEL: Thank you, your Honor.

25 THE COURT: All right? So, then that will take 16:22:21